Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Sponsorship Identification Rules	)	
And Embedded Advertising	)	MB Docket No. 08-90
	)	

REPLY COMMENTS OF FOX ENTERTAINMENT GROUP, INC.

Fox Entertainment Group, Inc. ("Fox") hereby respectfully submits these reply comments in connection with Commission's Notice of Proposed Rulemaking and Notice of Inquiry in the above-captioned proceeding.[1]

The comments filed in response to the *Notice* overwhelmingly confirm that the Commission's existing sponsorship identification rules are more than adequate to the task of informing American viewers when a broadcaster has received valuable consideration from a third party in exchange for broadcasting program material. Equally important, the comments explain that any Commission effort to impose on broadcasters onerous new disclosure burdens would exacerbate the serious financial challenges threatening free, over-the-air broadcasting in this incredibly volatile economic environment.

Fox therefore urges the FCC to recognize that the record reveals no need for action in this proceeding and, in fact, that action would have profoundly harmful consequences for free, over-the-air television.

[1] *See In re Sponsorship Identification Rules and Embedded Advertising*, Notice of Inquiry and Notice of Proposed Rulemaking, FCC 08-155, MB Docket No. 08-90 (rel. June 26, 2008) (the "*Notice*").

Existing Disclosure Policies Ensure
<u>that the Audience Has Reasonable Access to Sponsorship Information</u>

The National Media Providers, a coalition of advertisers and program producers (including Fox), submitted detailed comments in this proceeding explaining that the Commission's existing sponsorship identification rules already require broadcasters to provide viewers with information sufficient to inform them when broadcast content has been paid for by or sponsored by a third party.[2] Indeed, for more than 80 years, broadcasters have adhered to an unwavering standard requiring them to reasonably identify and disclose the commercial sponsor when they televise matter for which they have received valuable consideration. Section 317 of the Communications Act applies to all forms of programming material, including traditional commercials, product placement and product integration.[3] Broadcasters have long been providing sponsorship announcements when required pursuant to Section 317 and the FCC's Rules, making clear in language understandable to the audience when consideration has been received (and from whom) in connection with broadcast content.[4]

The National Media Providers' comments also trace the historic, and inextricable, links between over-the-air broadcasting and commercial advertising.[5] Because broadcasters rely almost exclusively on advertising revenue to create high-quality, compelling content, the

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[2] *See* Comments of The National Media Providers, MB Docket No. 08-90 (filed Sept. 22, 2008) ("National Media Providers' Comments"), at 2-4.

[3] *See* 47 U.S.C. § 317 ("Section 317"). In these reply comments, Fox uses the term "embedded advertising" to denote both "product placement" and "product integration," as those terms are defined in the *Notice*. Moreover, as used herein, "embedded advertising" refers only to "product placement" and "product integration" for which sponsorship identification is required under Section 317.

[4] *See id.*; *see also* 47 C.F.R. § 73.1212.

[5] *See* National Media Providers' Comments, at 8-12.

Commission itself has long recognized that advertising is an essential element of the success of free television.[6] Commercials and sponsored content have always served as the principal resource that broadcasters use to support programming responsive to the tastes, needs and interests of American viewers.

Even before the severe turmoil that has roiled the national economy in recent weeks, over-the-air broadcasting has been beset by critical challenges to its future. Multichannel video programming networks continue to erode broadcasters' share of the overall audience, exerting pressure on advertising revenues even as the costs to produce high-quality content are escalating.[7] At the same time, advanced technologies increasingly are giving viewers the option to bypass traditional advertising altogether.[8] From DVRs that permit viewers to fast forward through commercials to Internet file sharing sites that facilitate the distribution of video stripped of commercials, the broadcast business model is under pressure as never before. Now these challenges have been compounded by the bleak national economic picture, which not only impedes broadcasters' ability to finance their operations, but also threatens to slow other businesses' capacity to afford advertising.

Indeed, it is precisely because of these economic challenges that the television industry has turned to innovative methods of generating revenue, including embedded advertising. Embedded advertising is a way to relieve the pressures weighing on the traditional advertising model, enabling content creators to tap into a much-needed new stream of revenue by

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6 *See id.* at 8-9 (*citing* Federal Communications Commission, *Public Service Responsibility of Broadcast Licenses* (1946)).

7 *See id.* at 10.

8 *See id.*; *see also* David Goetzl, *Nielsen: DVR Use Up, America Readies for Digital Switch*, MediaPost Publications, July 17, 2008.

unobtrusively weaving products and brands into compelling stories. When done effectively, embedded advertising can create a seamless experience for viewers – for whom storylines are made more realistic by the inclusion of real-life brands – while minimizing the lengthier commercial breaks that interrupt the viewing experience (and for which viewers, voting with their remote controls, have demonstrated decreasing patience).[9]

Broadcasters will face a difficult enough balancing act in addressing all of these economic challenges without burdensome new disclosure regulations. But there can be no mistake: If the Commission imposes heavy-handed new sponsorship rules, it is the viewing public that will suffer right along with the broadcast industry. The advertising community has made absolutely clear that new regulation – especially a requirement for simultaneous disclosure for embedded advertising content – would be tantamount to a ban on these innovative advertising methods.[10] The creative community likewise has indicated that more onerous disclosure rules would be an affront to artistic integrity.[11] Thus, FCC action would run the very real risk of stamping out alternative forms of advertising altogether, which as a practical matter would make it even more difficult for broadcasters to continue to invest in the types of free, over-the-air programming that viewers have come to expect.

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[9] Contrary to the suggestion of some commenters, the fact that effective product placement can be "seamless" – *i.e.*, not disruptive to the viewing experience – does not render it automatically "deceptive." *See* Comments of N.E. Marsden, MB Docket No. 08-90 (filed Sept. 22, 2008) ("Marsden Comments"), at 25.

[10] *See* Comments of GroupM Worldwide, Inc., MB Docket No. 08-90 (filed Sept. 22, 2008) ("GroupM Comments"), at 1.

[11] *See, e.g.*, Comments of Screen Actors Guild, MB Docket No. 08-90 (filed Sept. 22, 2008), at 9 (compelled "disclosure at the time of product placement or integration . . . may disrupt the viewing experience and distract from an actor's performance").

There is nothing nefarious about product placement or product integration, and despite the occasionally overwrought rhetoric from their opponents,[12] no commenter has demonstrated that including sponsored content within programming material causes harm to any viewer. If anything, as the National Media Providers' comments explain, there is social science evidence reflecting that consumers are well aware that product and brand exposure during programming material constitutes advertising.[13] Regardless, as described below, Fox includes disclosure announcements in connection with embedded advertising when required by Section 317 and the Commission's Rules.

In short, before the Commission attempts to impose on broadcasters dramatic new rules affecting programming content – raising serious First Amendment issues – it should demand actual evidence both that there is a legitimate harm to be cured and that the existing rules of the

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[12] *See, e.g.*, Comments of Commercial Alert, MB Docket No 08-90 (filed Sept. 22, 2008) ("Commercial Alert Comments"), at 2, 15 (describing product placement as "hidden" advertisements and suggesting that they cause "deception"); Comments of Children's Media Policy Coalition, MB Docket No. 08-90 (filed Sept. 22, 2008), at 3-4 (calling embedded advertising "exploitative"); and Marsden Comments, at 19 (expressing concern that product placement is inherently "deceptive"). None of these commenters, however, explains how advertising contained within programming matter is different in any material respect from advertising contained in commercial breaks.

[13] *See* National Media Providers' Comments, at 25-26; *see also* GroupM Comments, at 3-4 ("The truth of the matter is that viewers who encounter product placement are fully aware of the fact that they are being marketed to, since product placement is neither novel nor particularly subtle"). Section 317 and the FCC's policies account for situations in which it is readily apparent to viewers that broadcast content has been paid for or sponsored: In those instances where both the identify of a sponsor and the fact that content has been paid for are obvious, no specific sponsorship announcement is required. *See* 47 U.S.C. § 317(d); 47 C.F.R. § 73.1212(f). While this "obviousness" exception traditionally has been the realm of advertisements that run in commercials breaks during regular program material, there is no reason why the same rationale should not apply to advertisements incorporated into program content. There is no dispute that all advertising entails an effort to persuade viewers to consider purchasing a product or service; whether that message appears within or separated from program content is immaterial. Opponents of embedded advertising apparently assume that viewers are imbued with an inherent naiveté and thus are wholly unaware that the mention of a brand name within a program likely has been paid for by the owner of the product in question. In reality, of course, viewers are cognizant that embedded advertising associations are not serendipitous. Indeed, as the Progress & Freedom Foundation points out in its comments, it is quite paternalistic for critics of embedded advertising to assert that even as *they* recognize product placement to be pervasive advertising, the public at large is somehow oblivious and incapable of reaching the same conclusion. *See* Comments of Progress & Freedom Foundation, MB Docket No. 08-90 (filed Sept. 22, 2008), at 5; s*ee also* Comments of Trinity Christian Center of Santa Ana, Inc., MB Docket No. 08-90 (filed Sept. 22, 2008), at 1-2 ("additional regulations [would] embody a disturbing kind of paternalistic governmental presumption . . .").

road are not working as intended. Given the clear record in this proceeding, the FCC should be exceedingly wary of taking action that would risk wreaking havoc on free, over-the-air television.[14]

Fox Takes Seriously Its Responsibility to Inform Viewers About Sponsored Content

A handful of commenters essentially complain to the Commission that sponsorship disclosures made pursuant to existing FCC policies, which have informed American audiences for decades, are somehow hidden from view.[15] Fox submits that this accusation is simply unfounded. In reality, Fox and other broadcasters have demonstrated a long-standing commitment to compliance with Section 317 and to providing viewers with adequate disclosure about sponsored content.

Fox has put in place sponsorship disclosure practices that ensure its viewers have access to information about paid content requiring Section 317 identification that appears on Fox's broadcast networks (both the FOX Network and MyNetwork TV). In most instances, the required disclosures appear at the end of programs. Specifically, Fox requires that its networks clearly identify each company that sponsors or pays for advertising content contained in program material, with disclosures that remain on screen for reasonable amounts of time and that are made in text of sufficient size so that an average viewer is capable of reading the information. Fox's policies also mandate that each sponsoring entity's name appears on its own line of text (so viewers are not simply faced with an illegible jumble of names).

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[14] Fox fully supports the National Media Providers' comments explaining that the Commission has neither authority nor reason to adopt rules that exceed the specific terms of Section 317, including extension of the sponsorship identification rules to national cable programming networks. *See* National Media Providers' Comments, at 36-41.

[15] *See, e.g.*, Commercial Alert Comments, at 10.

All of these policies are designed to ensure that viewers who want a reasonable opportunity to review sponsorship information can do so. To the degree some commenters suggest that viewers typically do not read the text of sponsorship information or other program credits that appear at the end of a television program,[16] that is of no particular moment. First, as noted above, viewers today typically recognize product placement and brand mentions within programming as advertising at the moment they see it.[17] Given the obviousness of this advertising, it would come as no surprise if it were true that viewers do not make much effort to review textual sponsorship identification disclosures. But that would suggest that the sponsorship identification regime itself is unnecessary – not that text disclosures at the end of programs fail to provide viewers with adequate access to information.

Second, and equally important, Section 317 and the Commission's Rules are intended only to ensure that any viewer who cares has a *reasonable opportunity* to learn about sponsorship information. Some commenters apparently would like the Commission to treat the sponsorship identification rules as a mandate for the government to somehow *require* every viewer to be informed about sponsorship. But that has never been the goal of Section 317.[18] To say, as some commenters have, that "people have a right to know when they are being advertised to"[19] does not mean that they must by law be subjected to a bombardment of additional and inescapable disclosures. So long as viewers have reasonable access to disclosure information, as

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16 *See id.* at 14 ("very few viewers watch credits").

17 *See* National Media Providers' Comments, at 25-26; GroupM Comments, at 3-4.

18 *See In re Applicability of Sponsorship Identification Rules*, Public Notice, 40 F.C.C. 141 (1963). As the Commission pointed out in the *Notice*, the 1963 sponsorship identification order "emphasiz[ed] that 'listeners are *entitled*'" – but not required or even necessarily expected – "'to know by whom they are being persuaded.'" *See Notice*, at ¶ 4, note 16 (*citing Sponsorship Identification Rules*, 40 F.C.C. at 141) (emphasis supplied).

19 *See, e.g.*, Commercial Alert Comments, at 1.

is currently the case for broadcast programming, the policy goals of Section 317 and the Commission's Rules are being satisfied.[20]

Some commenters in this proceeding also have expressed concern that embedded advertising is potentially harmful to children, citing in particular the FOX Network program *American Idol*. The Coalition for a Commercial-Free Childhood, for instance, urges the Commission to ban product placement during prime time, family viewing hours, "when children are likely to be in the audience."[21] As CCC correctly notes, *American Idol* is perhaps the preeminent example of a family-oriented program, with parents and children watching together each week.[22] Rather than ban product placement in *American Idol* and similar shows, however, the Commission should recognize that family viewing is a time when children are *least* at risk of being harmed (to the degree that exposure to commercial messages can be considered harmful).

When mothers, fathers and their children are watching television together, there is no need for the government to usurp the role of parents – either in educating kids about commercialism or in protecting them from instances of potential harm. Quite the contrary, it is at those times when parents *are present* in their children's lives that government should exercise the most restraint.[23] This is especially true when government intervention (such as a ban on

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[20] *See U.S. v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 824 (2000) (content regulation can survive Constitutional scrutiny only if there is no "less restrictive alternative" to regulation; "It is no response that [a less restrictive alternative] requires a consumer to take action, or may be inconvenient, or may not go perfectly every time. A court should not assume a plausible, less restrictive alternative would be ineffective . . . .").

[21] Comments of the Campaign for a Commercial-Free Childhood ("CCC"), MB Docket No. 08-90 (filed Sept. 22, 2008), at 18.

[22] *See id.* at 19.

[23] The Commission need not be concerned about potential harms that could arise in connection with programming specifically targeted to children (which may include programming that children watch with less parental supervision). As the record in this proceeding confirms, the Children's Television Act and the FCC's Rules already explicitly limit the amount of advertising permissible during children's programming, and the Commission already requires that advertising and programming content be separated by suitable "bumpers" during children's programming. Thus, embedded advertising is nonexistent in programming specifically

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product placement) would threaten the financial underpinnings of free television and place at risk the very family-oriented programming that CCC and other groups purport to care so much about.

In any case, the product placement on *American Idol*, in particular, can hardly be considered "hidden" or "deceptive" advertising. Indeed, the program has partnered with iconic American companies and brands and, if anything, its use of on-screen billboards and graphics only serves to highlight the sponsors' participation in the program. Even Commercial Alert, the group that filed the Petition for Rulemaking that undergirds this entire proceeding, recognizes in its opening comments that there are times when, through the use of billboards or segment branding, advertising embedded in programming is so obvious that no special disclosure should be required.[24] By Commercial Alert's own reckoning, there can be no question that *American Idol* would qualify as a program for which no special sponsorship announcements are necessary. Regardless, as part of its commitment to ensure that its viewers have every reasonable opportunity to learn about paid content, Fox includes sponsorship identification disclosures even during *American Idol*.

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In sum, no commenter has presented the Commission with any evidence justifying heavy-handed new governmental regulation. At the same time, broadcasters have explained that free, over-the-air television is under immense pressure– not just to compete for viewers and advertising revenues with new technologies and other media, but also to survive in a precarious economic environment. Any government action to inhibit broadcasters from pursuing new

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targeted to children, and there is no need for rule changes or increased regulation to address children's exposure to it.

[24] *See* Commercial Alert Comments, at 11.

streams of revenue would pose a significant threat to their economic future. If the Commission wants to ensure that over-the-air television continues to be available to educate, entertain and inform American viewers, it should refrain from taking any action in this proceeding.

Respectfully submitted,

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